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In The

SEP 22 1975

Supreme Court Of The United States

October Term 1975

MORRIS I. COHEN
Petitioner Pro se,

v.

ANCHOR HOCKING GLASS CORPORATION,
POWELL & OAKES, INC., and
HERMAN GRANT, REGIONAL ATTORNEY
for the UNITED STATES DEPARTMENT
of LABOR
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

MORRIS I. COHEN,
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v.

ANCHOR HOCKING GLASS CORPORATION,
POWELL & OAKES, INC., and
HERMAN GRANT, REGIONAL ATTORNEY FOR THE
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

OPINIONS BELOW

The United States District Court for the Southern District of Indiana, Indianapolis Division awarded summary judgment to the Anchor Hocking Glass Corporation pursuant to Rule 56, Summary Judgment to respondents Powell & Oakes, Inc., and Herman Grant for failure to state a claim upon which relief can be granted. Both opinions are attached hereto.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered judgment on June 3, 1975, for respondents on the basis of lack of jurisdiction for the parties.

Petitioner submitted a petition for rehearing en banc which was denied on June 30, 1975.

The Statutory provision believed to confer jurisdiction to the Court is

Title 28 U.S.C. Sec. 1254

QUESTIONS PRESENTED FOR REVIEW

1. Is there federal question jurisdiction under Title 28 U.S.C. Sec. 1331 when a party is a Regional Attorney for the United States Department of Labor and when he deposes that he was acting as a public officer?

2. Can diversity of citizenship be asserted on an agent who is acting for one who is a citizen of another state under Title 28 U.S.C. Sec. 1332?

3. Is the Court of Appeals precluded from ruling on the merits of a case when there has been a motion for summary judgment?

4. Is there federal question jurisdiction on a party under Title 28 U.S.C. Sec. 1331 who is operating under the Federal Rules of Civil Procedure?

CONSTITUTIONAL PROVISION AND STATUTES

Fifth Amendment to the Constitution of the United States in part as follows:

> "* * *Nor be deprived of life, liberty or property without due process of law; * * *"

Federal Rules of Civil Procedure, rule 30 under Title 28 U.S.C.A.

The Fair Labor Standards Act of 1938, Title 29 U.S.C. (201 et sequ.)

Federal Tort Claims Act of 1946, 60 Stat. 842.

Ind. Code 34-1-2-2, Ind. Annot Stat. 2-602 (Burns 1967 Repl.)

Ind. Code 34-1-2-9, Ind. Annot. Stat. 2-609 (Burns 1967 Repl.)

Rules of Decision Act, Title 28 U.S.C. Sec. 1652

Judiciary Act of 1789, ch. 20 Sec. 34, 1 Stat. 92 through Rev. Stat. Sec. 721 and Title 28 U.S.C. Sec. 725 (1940)

STATEMENT OF THE CASE

Petitioner is an attorney who is engaged

in the practice of law in Marion County, City of Indianapolis, State of Indiana. Petitioner was formerly an investigator with the United States Department of Labor, Wage & Hour & Public Contracts Divisions, and was honorably retired on September 19, 1963. He was admitted to the Indiana University School of law in Bloomington, Indiana in 1963 and completed his requirements for J.D. degree in February 1967. He passed the bar in March 1967 and was admitted to the rolls to practice on May 17, 1967. Respondent Anchor Hocking Glass Corporation is engaged in the manufacture of glassware. Respondent has a factiory located in Randolph County, Winchester, Indiana. Its principal place of business is located in the State of Ohio. Respondent Powell & Oakes, Inc. is an Indiana corporation who acted as agent for respondent Anchor Hocking Glass Corporation in submitting Dorothy Huffman, one of

its employees, to take an oral deposition of petitioner on February 5, 1969, in the case of Wirtz v. Anchor Hocking Glass Corporation, No. IP-67-C-140.

The case was to be tried in the United States District Court for the Southern District of Indiana in which the complaint by the United States Government under the name of W. Willard Wirtz, Secretary of Labor against Anchor Hocking Glass Corporation. The complaint alleged minimum wage and overtime violations under Section 6(d) and 7(a)(6) of the Fair Labor Stanadards Act of 1938, as amended, 29 U.S.C.(201 et seq.) under the qual pay for equal for women, and alleged overtime violations of the aforesaid Act with regard to twenty-one (21) production and maintenance employees. The investigation of respondent Anchor Hocking by the United States government was approximately two years after petitioner was retired from the United States

government after twenty-one years of service.

A subpoena duces tecum was served on petitioner by respondent Anchor Hocking Glass Corporation to submit to an oral deposition. Petitioner, resorting to strict instructions issued to him when he was an investigator, called the legal staff of the Wage & Hour Division by telephone and informed Mr. Grant, respondent, who was then Regional Director of Attorneys for the United States Department of Labor of the case. Respondent Herman Grant, contrary to legal procedure as practiced before directed petitioner to see a file which had been prepared on Respondent Anchor Hocking in the early 1950's which had to do with the compliance aspect as to a job classification of lehr foremen.

Three months after looking a the file which was a stripped down version with no

supporting exhibits, petitioner was called by telephone by Mr. Charles Bruess, attorney for respondent Anchor Hocking Glass Corporationand a three hour deposition was taken of petitioner which was solely confined to the status of the lehr foremen.

The deposition was never submitted to petitioner for signature or to check additions that were added over the telephone by Dorothy Huffman, rporter, which was against the requirements of the Federal Rules of Civil Procedure, rule 30. The deposition was never filed in the United States District Court.

Petitioner filed a complaint against respondents Anchor Hocking Glass Corporation, Powell & Oakes, Inc., agent for Anchor Hocking and Herman Grant, Regional Director of Attorneys for the United States Department of Labor, alleging that there was a conspiracy to defame, defamation, deprivation of due process of law, concealment of the deposition, and inter-

ference with his profession as an attorney in the practice of law by having him appear by command of subpoena duces tecum which was ridiculous on the face of it because both respondents knew petitioner had nothing to dow with the case by virture of an interrogatory to the United States government which listed Mr. Rolling Kin as the only person involved in the Wirtz case, supra.

Petitioner also alleged that contriving an admission that there was no overtime violation was defamatory per se with regard to the lehr foremen, by impugning petitioner to have lied under oath and therefore committed perjury. In addition petitioner was asked by interrogator Frederic Anderson if he had ever received bribes from establish- he had investigated.

The end result of the case by the United States Government against Anchor Hocking, respondent, was payment of $53,000.00 in minimum wage and overtime violations by

voluntary dismissal by the government under Rule 41 with prejudice.

Petitioner had stated in his deposition that there were no overtime violations in his examination of respondent Anchor Hocking and when the petitioner's is juxtaposed against the ultimate settlement, it would not be difficult to infer that he was committing perjury under oath, particularly when no date was on the subpoena duces tecum as to the period covered, and no indication that some one else had made the pertinent investigation 10 years subsequent to the one made by petitioner and on a completely different set of facts and amended statute of the Fair Labor Standards Act.

Subsequent to the taking of the taking of the deposition, petitioner was asked to bribe a United States government official in a Wage-Hour case by a client. Since the

taking of the depostion and the instance of one client asking him to bribe a government official, petitioner has not had one client in a Wage-Hour case.

Subsequently petitioner learned that his testimony in the deposition was completely irrelevant in the Wirtz case, supra, because there was a union involved as to the lehr foremen. The lehr foremen were classified as executive employes under the Wage & Hour Law, 29 U.S.C. (201 et seq.) when petitioner was in respondent Anchor Hocking's establishment and warned them to reclassify them (lehr foremen) as working foremen and pay them overtime. The union agreement provided for overtime pay on Saturdays and Sundays as such and because the workweek started on Wednesday, there was an overtime violation under Section 7(a)(6) of the Fair Labor Standards Act for paying premium for hours not falling on the sixth and seventh day of

of the week. The violation was a matter of law and not of fact and petitioner could not set any facts in his deposition that would affect the overtime violation. Moreover, Section 6(d) (equal pay for equal work for women) and Section 7(a)(6) as stated, supra, were added as amendments to the Fair Labor Standards Act after petitioner's retirement. They were not in effect at the time petitioner was employed by the government.

Petitioner filed motions for production of documents as to all respondents and the district court granted Herman Grant, Regional Director of Attorneys for the United States Department of Labor, a stay of discovery proceedings after the 60 day period of time granted to the government or public officers.

All three respondents filed motions to dismiss under Rule 12(b) of the Federal Rules. Volume IV of the Wirtz case disappeared from the offices of the clerk of the United States

District Court and never did become available to petitioner. The aforesaid volume was available four months prior to filing of the complaint. Petitioner filed a motion to amend complaint to include George Campbell, supervisor of respondent Anchor Hocking as being present at the deposition and therefore having ratified the act of its agent, respondent Powell & Oakes, Inc. Motion was granted after six months.

Notice of pre-trial conference was served to all parties by the court. None of respondents had filed an answer and the parties were not yet at issue. This was on October 15, 1973. No rulings were made on motions before the court. Motion for leave to file evidence in support of motion to dismess was granted by the court to respondent Anchor Hocking and petitioner was granted 15 days to answer from date of granting of motion on November 15, 1973. Eight days before the

time to respond to aforesaid motion elapsed, the court awarded summary judgment to respondent Anchor Hocking Glass Corporation without a motion having been submitted, although the order so states. Summary judgment was awarded to respondent Powell & Oakes, Inc., on the basis of rule 12(b)(6) for failure to state a claim upon which relief could be grant based on the statute of limitations with no reference to matters outside of the pleadings having been submitted to the court, and summary judgment was awarded to Herman Grant, Regional Director of Attorneys for the United States Department of Labor for failure to state a claim upon which relief could be granted under Rule 12(b)(6) as having matters presented outside of the pleadings. The only affidavits submitted by respondent Grant, and his superior, Richard F. Schubert, Solicitor General, were to the effect that Mr. Grant

was acting in pursuance of his office as a public officer of the United States.

Petitioner also alleged in his complaint that there was concealment; Ind. Code. 34-1-2-9 (1971), Ind. Annot. Stat. 2-609 (Burns 1967 Repl.) which tolled the statute of Limitations and also that the five year statute of limitations as delineated in Ind. Code., 34-1-2-2, Ind. Annot. Stat. 2-602 (Burns 1967 Repl.) as an officer accomplishing an act in Dorothy Huffman's capacity as a notary public. A notary public is considered a public officer under Indiana law. There was no hearing as required by federal rule 56 on summary judgment proceedings in any of the aforementioned awards. In the case of respondent Anchor Hocking there is no where in the record where a motion for summary judgment was filed by foregoing respondent and none of the cases reported show where a summary judgment is made by at least one

of the parties without such motion on record.

The United States Court of Appeals held for lack of jurisdiction as to Herman Grant, Regional Director of Attorneys for the United States Department of Labor as to there being no federal question under Title 28 U.S.C. Sec. 1331 and also no diversity of citizenship under Title 28 U.S.C. Sec. 1332. Also an erroneous fact was cited in its finding as to Powell & Oakes, Inc., in which it stated that respondents Herman Grant and Powell & Oakes, Inc. were agents of Anchor Hocking. The facts as stated are that Herman Grant, representing the United States government was an adverse party. On basis of the foregoing the Court was not accurate in its comprehension of the facts. Moreover, the Appeals Court did not have the entire record before it. Petitioner requested the record from the Appeals Court because he

did not have a chance to examine the record before it was sent to the Appeals Court and the service of process issued by him for service to the United States Marshal would have indicated that Mr. Grant was serviced personally by certified mail at 219 S. Dearborn St., Chicago, Illinois. This was not in the record.

JURISDICTION AS TO LOWER COURT

Pursuant to 23(g) of the United States Supreme Court rules the basis for jurisdiction on the parties are as follows:

Respondent Anchor Hocking Diversity of Citizenship

Respondent Powell & Oakes, Inc. Diversity of Citizenship as agent of Anchor Hocking and also Federal Question coverage under Federal Rules.

Respondent Herman Grant, Reg. Dir. of Attorneys for U.S. Dept. of Labor — Federal Question under Const. & Stat.

REASONS FOR GRANTING OF WRIT

Petitioner submits that a petition for writ of certiorari should be granted because:

1. The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with other courts of appeals.

2. Has decided a federal question in a way to conflict with applicable decisions of the United States Supreme Court.

3. Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the United States Supreme Court's power of supervision.

Specification of Errors

UNITED STATES DISTRICT COURT

1. Award of dummary judgment to respondent Anchor Hocking without a motion as required under Rule 56 and without a hearing.

2. Award of summary judgment to respondent Powell & Oakes, Inc. on basis of statute of limitations as failure to state a claim upon which relief could be granted which is a question of law and fact without a hearing.

3. Award of summary judgment to respondent Herman Grant, Regional Director of Attorneys on basis of failure to state a claim for relief as having presented matters outside the pleadings without a hearing.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

4. Ruling of the Court on the merits of allegations of fact when such is precluded on motion for summary judgment because all of facts alleged in complaint are to be regarded as true in motion for summary judgment or failure to state a claim upon which relief could be granted.

5. Misstatement of facts by Appeals Court in ruling lack of jurisdiction.

ARGUMENT

JURISDICTION AS TO RESPONDENT HERMAN GRANT, REGIONAL DIRECTOR OF ATTORNEYS FOR THE UNITED STATES DEPARTMENT OF LABOR

The United States Court of Appeals for the Seventh Circuit based its finding of lack of jurisdiction as to Herman Grant, Regional Director of Attorneys for the United States Department of Labor and as officer of the

government on the bais of diversity of citizenship between petitioner and aforesaid respondent.

Petitioner takes issue with the Court's finding as to there being no jurisdiction for respondent Grant primarily because he was an officer of the United States Department of Labor and secondly because he was a resident of the state of Illinois and service of process was made in personam on him at 219 S. Dearborn Street, Chicago, Illinois, which is the regional office for attorneys of the United States Department of Labor. This service of process was not in the transcript of record sent to the Appeals Court which apparently was the reason the Court stated that it was an undisputed fact in its opinion that there was no diversity of citizenship. On page 2 of comp., p. 7 of trans. of record the statement is made that Herman Grant was a Regional Attorney

for the United States Department of Labor in charge of the Regional Office. In support of the foregoing it was stated in Jones v. Andrews, 77 U.S. 327, 10 Wall. 327, 19 L. Ed. 935 that an allegation of citizenship is sufficiently made when it appears fairly and in such a way as to leave no room for reasonable doubt from the bill or declaration of which states the respective parties are citizens. All that the Appeals Court would have to do if it had doubts as to diversity of citizenship was to look at the process made on respondent Grant. The United States Supreme Court stated at page 331:

> "Although the allegation of citizenship is not made in precise and technical form we consider it sufficiently explicit to sustain the jurisdiction of the court if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than in the case of Express Company v. Koontz, (8 Wallace 342) which was sustained by the court. All that is necessary is that it fairly

appear by the bill of what state the respective parties are citizens."

Under remarks on process made by the United States Marshal on 4/21/72 the notation was made at Department of Labor by certified mail. As mentioned before the address was to Chicago, Illinois, at the address of the Regional Office of the United States Department of Labor. This was not part of the record and the docket sheet will confirm that the service of process on all respondents was omitted from the official record.

Although the foregoing presents a good argument for combination jurisdiction as to respondent on diversity of citizenship and the federal question, a specific allegation as to jurisdiction arising under the Constitution and federal statutes was the thrust of petitioner's allegation of jurisdiction. At p. 73 of trans. of rec. the following exhibits were submitted by counsel for respondent Grant and by Mr. Richard F.

Schubert in part as follows pp. 73-76

official trans. of record:

"File No. IP-72-C-185

AFFIDAVIT OF HERMAN GRANT

STATE OF ILLINOIS)
COUNTY OF COOK) SS:

HERMAN GRANT, being first duly sworn sayeth as follows:

1. He is, and has been since 1949, the Regional Solicitor(formerly known as Regional Attorney) of Region VI of the United States Department of Labor. His office is located in Chicago, Illinois, and included within his region's jurisdiction is the State of Indiana.

2. His deputy, John Secaras, sometime in November of 1968, advised him that a former investigator of the Wage & Hour Division, United States Department of Labor, MORRIS I. COHEN, had telephone Mr. Secaras and had requested to look at the closed investigation file of Anchor Hocking Glass Corporation, Winchester, Indiana, for the purpose of refreshing his memory as to an investigation conducted in 1957. Mr. Cohen's request was made because he had been subpoena by Anchor Hocking Glass Corporation to testify at a deposition in the case of W. Willard Wirtz, Secretary of Labor v. Anchor Hocking Glass Corporation U.S. D. C. D. Indiana, Civil No. 67-C-140.

3. He in his official capacity as the Regional Solicitor of Region VI, United

States Department of Labor, did as a result of Mr. Cohen's request to Mr. Secaras, authorize the area director of the Wage and Hour Division in Indianapolis, Indiana, Mr. Kenneth Graue, to permit Mr. Cohen to see and review the 1957 Anchor Hocking Glass Corporation file, Winchester, Indiana.

s/ Herman Grant

Subscribed and Sworn to
before me on this 29th
day of June 1972

Ethel Appel
Notary Public

My commission expires November 12,1972

EXHIBIT A"

The following affidavit was submitted with motion to dismiss as to Herman Grant by Richard F. Schubert:

"Civil Action File
No. IP-72-C-185

AFFIDAVIT OF RICHARD F. SCHUBERT

UNITED STATES OF AMERICA)
)ss;
DISTRICT OF COLUMBIA)

RICHARD F. SCHUBERT, being first duly sworn says that:

1. He is the duly appointed and acting Solicitor of Labor;

2. As Solicitor of Labor, he is the immediate superior of Herman Grant;

3. Herman Grant is and at all times since a date prior to November 1968 was Regional Solicitor of the United States Department of Labor at Chicago, Illinois;

4. As Regional Solicitor, the said Herman Grant was responsible for conducting the plaintiff's case in W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Plaintiff, v. Anchor Hocking Glass Corporation, Defendant, being Civil Action No. 67-C-140 in the office of the Clerk of the United States District Court for the Southern District of Indiana; and

5. As the Department of Labor attorney responsible for conducting the litigation referred to in paragraph No. 4, above, the said Herman Grant was authorized to permit plaintiff Morris I. Cohen to see and review the file on the 1957 investigation report of the Anchor Hocking Glass Corporation, Winchester, Indiana, for compliance with the equal pay provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), as averred in the affidavit of the said Herman Grant subscribed and sworn to on June 29 1972.

s R. F. Schubert

Subscribed and sworn to before me on July 6, 1972

My commission expires on November 30, 1976

EXHIBIT B"

As a note to the above affidavits, petitioner in his responding brief objected to the foregoing affidavits on the basis of hearsay and incomplete facts. The incomplete and erroneous fact was that the equal pay provisions of the Fair Labor Standards Act was not enacted until 1963, so that was in error, instead of 1957 or prior thereto. The second error was that petitioner was called to testify as to the status of Section 7(a)(6) of the Fair Labor Standards Act, which was the overtime provision of the Act and which was not enacted until 1963 after petitioner left government service.

As can be seen from the foregoing affidavits, Mr. Grant was acting as a public officer and if the Appeals Court had examined the file and record, it would have been precluded from ruling on lack of

jurisdiction because Herman Grant, respondent, swore that he was a resident of and worked in Chicago since 1948. It is also obvious that the federal question jurisdiction is unrefutable based on the foregoing affidavits. The petitioner begs the indulgence of the Court in presenting the foregoing affidavits, but from petitioner's experience with the mishandling of records by the district court clerk he has presented the affidavits verbatim because it lays the foundation for his allegation of the federal question jurisdiction.

The United States District Court did not grant respondent Grant's motion to dismiss, but ruled that summary judgment should be granted on the basis of failure to state a claim for relief, as having presented matters outside the pleadings. All that was submitted were the two affidavits, supra. No hearing was held as required under Federal

Rule 56. Moreover, under Rule 12(b)(7) failure to join a party under Federal Rule 19 would subject the case to dismissal on the basis of failure to join an indispensable party. All three respondents name in the subject case would have the foregoing applicable to them. In addition, Rule 20(a) of the Federal Rules of Civil Procedure also states that all persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. Obviously the allegation of conspiracy is enough to put all three respondents within the purview of the foregoing rule. In addition, the deprivation of due process of law, concealment and defamation of character contained

in the deposition a fortiori is all part of the same occurrence and transaction. The United States Court of Appeals for the Seventh Circuit commented and adjudicated all of the allegations of fact without taking into consideration that when there is a motion to dismiss under Rule 12(b)(6), it is tantamount to subjecting the complaint to scrutiny by the court in terms of the allegations in the complaint as being true. On page 86, off. trans. of record and page 6 of petitioner's brief in response to respondent Grant's motion to dismiss, petitioner states that it was so stated in Lehigh Coal & Navigation Co. v. Central R. of New Jersey, (D.C. Pa. 1940) 33 F. Supp. 362 that where a motion to dismiss is limited to allegations of complaint and on such a motion which is the equivalent of a demurrer, the court is called upon to interpret the allegations and to accept all such allegations as true and

to determine whether the complaint presents a cause of action.

Petitioner further states in the same brief that in the Fifth Circuit a motion to dismiss was made under Rule 12(b)(6) and it was stated in Fowler v. Southern Bell Tel. and Tel. Co., (5th Cir. 1965) 343 F. 2d 150 that generally a motion to dismiss for failure to state a claim upon which relief can be granted serves the same function as a common law demurrer, i.e., to challenge the legal sufficiency of a complaint. Also in Investors Syndicate of America Inc. v. City of Indian Rocks Beach, (5th Cir. 1970) 434 F. 2d at page 876:

> "* * * The motion to dismiss under Fed. Civ. Proc. 12(b)(6) admits all well pleaded facts in the complaint which it challenges just as did its antecessor the common law demurrer. Both a motion to dismiss and a demurrer pose this legal challenge: If every fact alleged by the opposite party be taken as established, the pleader is still entitled to relief against me. * * *"

To indicate that there is complete unanimity in this aspect of the Federal Rules it was stated in the second Circuit in Michael v. Clark Equipment Co., (2nd Cir. 1967) 380 F. 2d 351 that there was no justification in the rules for an order to a plaintiff to set forth his cause cause of action clearly in that the only relevant requirement of this rule and rule 12 of these rules is that stating a claim on which relief can be granted and there is no requirement that a plaintiff prove a bill of particulars. And finally the United States Supreme Court stated in United States v. Mississippi, 85 S. Ct. 808, 380 U.S. 128, 13 L. Ed. 2d 717 on remand 256 F. Supp. 344 (1965) in a voting rights case where a three judge panel was sitting in the United States District Court that in considering correctness of ruling that complaint failed to state a claim upon which relief could be

granted, allegations of complaint are to be regarded as true. In the foregoing case, all of defendants moved to dismiss on the grounds that complaint failed to state a claim upon which relief could be granted.

The United States District Court in the case at bar granting summary judgment to all defendants (respondents) stated:

> "This cause came before the Court upon the motion of Anchor Hocking Glass Corporation for summary judgment pursuant to Rule 56, Fed. Rules of Civ. Procedure, and upon the motions of defendants Powell & Oakes, Inc. and Herman grant to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Defendant Grant's motion which is accompanied by material outside the pleadings should be and the same hereby is, considered to be a motion for summary judgment under Rule 56."

The first sentence of the foregoing paragraph is incorrect in that there was never a motion for summary judgment sub-

mitted by respondent Anchor Hocking Glass Corporation. Secondly counsel for respondent Herman Grant submitted two affidavits in its motion to dismiss, one by respondent Grant stating that he was acting in the pursuance of his duties, ante p.p. 17-19, when he allowed petitioner to be subpoenad duces tecum knowing full well that he could not testify because Rollin King was the only investigator with the United States Department of Labor involved in the Wirtz case supra, see p. 90 off. transc. of record and brief, and the other affidavit was by Mr. Richard F. Schubert, Solicitor General. Trans. of record. pp. 73, 74, 75, 76, Exhibits A and B respectively of Grant & Schubert. Both affidavits did not contain material outside of the pleadings.

With regard to respondent Powell & Oakes, Inc. as failing to state a claim upon which relief can be granted, which was based on

the statute of limitations, petitioner submits that there was a question of fact involved because he alleged concealment in the complaint under Ind. Code. 34-1-2-9, Ind. Annot. Stat. 2-609 (Burns 1967 Repl.) and alleged the five year statute of limitations under Ind. Code. 34-1-2-2, Ind. Annot. Stat. 2-602 (Burns 1967 Repl.) for public notaries-(officers).

Under the concealment statute there was a tolling of the statute of limitations until it was brought forth (deposition) by motion to produce records and documents pursuant to rule 34 of the Federal Rules of Civil Proc. It is submitted that there was a question of law and fact based on the foregoing. Furthermore in both cases a hearing should have held as required by summary judgment procedure, and which was not held by the court. The matter of the statute of limitations was not outside of the pleadings and there-

fore could not used under rule 12(b)(6) in the case of Powell & Oakes, Inc., respondent. The other allegation which the United States Court of Appeals thought had merit with regard to respondent to Powell & Oakes, Inc. was that there was no diversity of citizenship jurisdiction. This will be discussed, infra, in the matter of agency, with regard to aforesaid respondent, and which the district court thought had merit as to jurisdiction.

As a final premise petitioner submits that the United States Court of Appeals was precluded from ruling that there was lack of jurisdiction as to respondents Grant and Powell & Oakes, Inc. if the allegations of fact are to be considered as true as stated ante.

Petitioner submits that respondent Grant is under the jurisdiction of the court under the Federal Question as delineated

by Title 28 U.S.C. Sec. 1331 arising under the Constitution and statutes of the United States.

The federal question is applicable to to respondent Herman Grant under Rhetorical paragraph number 3 of the complaint--off. trans. of rec. p. 6 as follows:

> "3. Herman Grant, defendant is Regional Attorney for the United States Department of Labor and jurisdiction is based on a federal question and federal statutes."

Rhetorical paragraph number 12--trans. of rec. p. 8 reads as follows:

> "12. The plaintiff alleges that he was deprived of due process of law by not being allowed to read and make appropriate changes as required by the Federal Rules of Civil Procedure before the deposition was published.

Rhetorical paragraph 14, on p. 3 of complaint--trans. of rec. p. 8 reads as follows:

> "14. Plaintiff alleges that permission to read investigation report at the Wage and Hour office under the supervision of

> Kenneth Graue, supervisor of the Indianapolis district office granted by Herman Grant, regional attorney for the United States Department of Labor, was done specifically to entrap plaintiff by refreshing his memory and was a civil conspiracy to defame plaintiff. The perusal of the investigation report was accomplished on November 7, 1968."

From the foregoing it is easily ascertainable that the federal question was applicaple, first, because Mr. Grant acted as a public officer for the United States Department of Labor under the Fair Labor Standards Act of 1938, 29 U.S.C. (201 et seq.) in the role of Regional Attorney who was in charge of the legal department of the United States Department of Labor for the Chicago region known as Region VI. Paragraph No. 12, supra, alleges that the petitioner was deprived of due process of law in the taking of the aforesaid deposition contrary to the Fifth Amendment of the Constitution of the United States. It is evident that the alleged

defamation contained in the deposition, i.e., perjury, and taking bribes from establishments under investigation when petitioner was employed by the Government. It was stated in Green v. McElroy, 360 U.S. 474 (1959) that the right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes under the "liberty and property" concepts of this clause (due process) and that no person shall be denied liberty or property without due process of law. Petitioner submits that he was deprived of the foregoing requirements as it related to his reputation as an attorney in following his chosen profession.

The Fifth Amendment is directed at the federal government as stated in Landowners Consideration Association v. Montana Power Co., (D.C. Mont. 1969) 300 F. Supp. 54. It was also stated in Walling v. Sharp, 347

U.S. 497 (1954) that the term liberty within the Fifth Amendment is not confined to mere freedom from bodily restraint but it extends to the full range of conduct which the individual is free to pursue and cannot be restricted except for proper governmental objectives.

Paragraph 14 of the complaint, supra, also alleges that Mr. Grant, respondent, gave the order as the person in charge of the regional office of attorneys of the United States Department of Labor to those under his supervision to accomplish the conspiracy in the Indianapolis district office of the United States Department of Labor.

Under section of Implied Powers at p. 368 of 67 C.J.S. Officers the following is stated:

> "In addition to powers expressly conferred by law, an officer has by implication such powers as are necessary for them and efficient exercise of those expressly granted or such as may be

> fairly implied therefrom. Acts may be done within the scope of official authority without being prescribed by statute or even without being specifically directed or requested by a superior officer. It is sufficient that such acts are done by an officer committed by law to his control or supervision or that they have more or less connection with the general matters committed by law to his control or supervision or that they are governed by a lawful requirement of the department under whose authority the officer is acting."

See affidavits of Herman Grant and Richard F. Schubert, ante. With regard to the same subject matter in note 23 p. 371 under 67 C.J.S. Officers, Sec. 103 the following is stated:

> Existence of Power
> Fact that exercise of power in particular way or under particular circumstances would be wrong does not establish, or even have the tendency to show, that power does not exist. Cahill v. Mayflower Bus Lines, (D.C. N.Y.) 7 F. Supp. 369 affirmed 77 F. 2d 8383 certiorari denied 56 S. Ct. 156, 296 U.S. 629, 80 L. Ed. 440."

Petitioner also submits that if the lex fori i.e., the substantive law of the State of Indiana were to be applied pursuant to the

Erie Tompkins Doctrine, respondent Grant is a servant of the United States government as well as an officer and generally the master is liable for the torts of his servant committed while servant (Grant) is acting within the scope of employment and the rule is referred to as the doctrine of respondeat superior. Gibbs v. Miller, 283 N.E. 2d 592 (1972). It was also stated under scope of employment that generally the question of whether one is acting within the scope of employment is a question of fact for the jury. Biel v. Kirsch, 130 Ind. App. 46, 153 N.E. 2d 140. Also under Indiana law where the masyer's liability for negligent act of servant is based on solely on respondeat superior not by reason of any personal share in the negligence, a suit may be maintained against both the master and servant and their liability is regarded as both joint and several, although they are not considered

to be joint tortfeasors.. Biel v. Kirsch, supra.

Also in Indiana while as a general rule a master is liable for the negligence of his servants only when they are acting within the line of their duty, yet an allegation in the complaint that defendant by its agents and servants caused the injury to plaintiff is sufficient. Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N.E. 85. Cf. status of respondent Grant to United States and status of respondent Powell U Oakes, Inc. to master Anchor Hocking Glass Corporation.

In a case that has many similarities to the case at bar a complaint was filed by parties who had been subpoenad to appear before a committe of the United States House of Representative proposing to conduct a hearing for damages against committee investigator involved controversy arising under the Constitution or federal laws within

jurisdiction of federal district court. Wheeldin v. Wheeler, (10th Cir. 1960) 280 F. 2d 293 the court stated that held that a marshal's action arose under the laws of the United States.

The United States Court of Appeals called respondent Grant "an employee of the United States" in its opinion. The United States Marshal in the case, supra, was also an employee of the United States government and the same rationale must therefore be applied to respondent Grant who himself submitted an affidavit stating that he was an attorney acting for the United States.

The Appeals Court ruled that since Mr. Grant was an employee of the United States, that he would not be subject to the federal question. Obviously the foregoing citation negates that contention. The following are submitted as subjecting the case to the federal question:

1. The Fifth Amendment to the Constitution of the United States.

2. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq.)

3. Title 28 U.S.C.A. Federal Rules of Civil Procedure, rule 30.

If the rationale of the Appeals Court were to be followed any case involving a public official and private citizen in the same state would be thrown out for lack of jurisdiction of the person. A case which illustrates this was in Laughlin v. Rosenman, 163 F. 2d 838, 22 U.S. App. D.C. 164 (1947) wherein it was stated tha the application of immunity of public officer from civil liability cannot be avoided by allegation that defendants were sued in their personal capacities.

In another case the United States Supreme Court stated that "officers" normally means those who hold defined offices and it

does not mean the "boys in the back room" or other agencies of invisible government whether in politics or in the trade union movement. NLRB v. Coca Cola Bottling Co. of Louisville, 76 S. Ct. 383, 350 U.S. 264, 100 L. Ed. 285. It is readily ascertainable from the foregoing citations that the United States Court of Appeals in ruling that there was no federal question as to respondent Grant goes contra to the decisions of other appellat circuits as well as the decisions of the United States Supreme Court.

It was stated by the United States Supreme Court that if a plaintiff really makes a substantial claim under an Act of Congress, there is jurisdiction in federal district court whether the claim ultimately be held good or bad. Montana Dakota Utilities Co. v. Northwestern Public Service Co., 71 S. Ct. 692, 341 U.S. 246. Moreover on a complaint setting forth a substantial claim under a

federal statute presents a case within the jurisdiction of the court as a federal court and this jurisdiction cannot be made to depend on the way the court decides an issue as to the legal sufficiency of the facts alleged, or the facts proved, as such a decision is predicated on the existence of jurisdiction which is the power to decide a justiciable controversy including questions of law as well as fact. Binderup v. Pathe Exch., 44 S. Ct. 96, 363 U.S. 291, 68 L. Ed. 308. To establish jurisdiction of federal courts on ground that federal question is involved, it must appear on record by a statement in legal and logical form such as is required in a pleading, that the suit really does involve a dispute or controversy as to a right which depends on construction of the Constitution or some law or treaty of the United States. Doby v. Brown, 232 F. 2d 504, certiorari denied 352 U.S. 837.

POWELL & OAKES, INC. WAS AN AGENT OF RESPONDENT ANCHOR HOCKING GLASS CORPORATION AND WAS SUBJECT TO THE FEDERAL QUESTION ALSO

Petitioner is submitting the frontispiece of the depsition in full because the deposition as contained in the record is all scrambled and despite petitioner's attempts to modify the record, the Court of Appeals denied his motion.

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor, Plaintiff	CIVIL ACTION No. IP-67-C-140
v.	
ANCHOR HOCKING GLASS CORPORATION, A corporation, Defendant.	

Deposition on oral examination of MORRIS I. COHEN, produced and sworn to before me, Dorothy Huffman, notary public in and for the State of Indiana in the offices of Barnes, Hickam, Pantzer & Boyd, Room 1313, Merchants Bank Building, in the City of Indianapolis, Marion County, Indiana, commencing at the hour of 10:10 a.m., on the 5th day of Fedruary 1969, pursuant to notice

and the Federal Rules of Civil Procedure.

This deposition was taken on behalf of defendant, Anchor Hocking Glass Corporation, a Corporation, in a certain action now pending before the United States District Court, Southern District of Indiana, Indianapolis Division, wherein W. Willard Wirtz, Secretary of Labor, United States Department of Labor, is plaintiff, and Anchor Hocking Glass Corporation, a corporation is defendant.

The first paragraph estalishes the requirement that Dorothy Huffman as an employee of Powell & Oakes, Inc., respondent, under the doctrine of respondeat superior, was taking the deposition under the authority of Title 28 U.S.C.A. Federal Rules of Civil Procedure, rule 30, and also that the Secretary of Labor was the plaintiff and the complaint was filed under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. (201 et seq.) both of which are federal statutes and therefore would put respondent, Powell & Oakes, Inc. under the purview of the federal question.

The second paragraph of the deposition

as stated, supra, establishes jurisdiction under the diversity of citizenship, which reads "This deposition was taken on behalf of the defendant, Anchor Hocking Glass Corporation" who is the principal and respondent Powell & Oakes, Inc. is the agent.

Petitioner submits the following table as delineating the principal-agent relationship and the doctrine of <u>respondeat superior</u> as follows:

1. Anchor Hocking Glass Corp.	Principal
2. Barnes Hickam, Pantzer & Boyd	Agent
(a) Frederic Anderson Atty.	Agent
(b) Charles Bruess Atty.	Agent
3. Powell & Oakes, Inc.	Agent
(a) Dorothy Huffman, notary public and reporter	Agent

The phrase "respondeat superior" is used to indicate responsibility of a principal for acts of his servants or agents. In determining the question of the doctrine the real test is whether at the time the employee commits the negligent act resulting in injury

to a third person he is performing some duty within the scope of employment. Annis v. Postal Telegraph Co., 114 Ind. App. 543, 52 N.E. 2d 373, 374, 375. In addition in the foregoing case it was stated that when one hires another to do something for him and such other does the thing he is employed to do in a negligent manner, whereby a third person is injured, the employee is liable to a third person.

As an employee of Powell & Oakes, Inc., Dorothy Huffman, notary public and court reporter, was subject to the foregoing doctrine and in I.L.E. Employment Sec. 261 the following is stated:

> "In General
> A third person may bring a joint action against an employer and his employee for injuries resulting from the wrongful act or negligence of the employee.
>
> A third person has a joint action against an employer and his employee for injuries resulting from the wrongful act or negli-

> gence or the employee under the doctrine of respondeat superior or he may bring his action either against the employer or employee. Indiana Nitroglycerine & Torpedo Co., v. Lippincott Glass Co., 165 Ind. 361, 75 N.E. 649 (1905); Wright v. Compton, 15 Ind. 337 (1876) Birly v. Washington Theatre Co., 112 Ind. App. 336, 41 N.E. 2d 819, (1942); Dunbar v. Demaree, 102 Ind. 585, 2 N.E. 2d 1003 (1936)."

At I.L.E. Employment Sec. 232 with reference to the liability of Dorothy Huffman, reporter, and her principal, respondent Anchor Hocking Glass Corporation it is stated as follows:

> "Under the doctrine of respondeat superior an employer is liable for the tortious acts of an employee within the scope of his employment. Commercial Credit Co v. Macht, 89 Ind. App.59, 165 N.E. 766; Premier Motor Co. v. Tilford, 61 Ind. App. 164, 11 N.E. 645; L. S. Ayres & Co. v. Harmon, 56 Ind. App. 436, 104 N.E. 315; Rink v. Lowry, 38 Ind. App. 132, 77 N.E. 967."

Petitioner submits that the deposition was taken at the behest of the principal, respondent Anchor Hocking Glass Corporation

through its attorneys, and a fortiori a representative of respondent Anchor Hocking Glass Corporation was present at the taking of the deposition by George Campbell, a supervisor of Anchor Hocking, which constituted ratification by the principal. See trans. of rec. p. 104--amendment to complaint to include George Campbell, supervsior of respondent Anchor Hocking Glass Corporation at taking of deposition.

To suppor the foregoing at I.L.E. Employment Sec. 236 under Ratification by Employer, the following is stated:

> "A wrongful act is committed by by an employee resulting in injury to a third person, for which the employer would not be liable may be so ratified by him as to fix liability on him for the injury." Louisville N.A. & Co. v. Smith, 121 Ind. 353, 22 N.E. 775 (1889); Bryan v. Pommert, 110 Ind. App. 61, 37 N.E. 2d 720 (1941).

A fortiori the wrongful act in the case at bar was committed knowingly and ratified

by respondent Anchor Hocking Glass Corporation by having one of its supervisors present at the deposition.

There is no statute in Indiana law defining agency except when the common law was embraced by statute in Indiana. However there is a voluminous amount of case law pertaining to agency and great weight is placed by Indiana courts on Corpus Juris Secundum and cites from it regularly.

At 3 C.J.S. Agency Sec. 485, p. 370, it is stated:

> "Generally, it is necessary and sufficient in an action by a third person to charge the principal with liability for the act of his agent, either to plead the act as that of principal, without averring or disclosing the agency, or to allege that it was authorized or ratified by him." (Emphasis supplied)

See reference to George Campbell, supervisor and employee of respondent Anchor Hocking Glass Corporation.

With reference to the same subject at

53 C.J.S., Libel & Slander, Sec. 150 it is stated as follows:

> "In accordance with general rules an an agent or servant may be liable for publishing a defamation and it is generally held that a principal, master, or employer may be held liable in damages for the publication of a defamation by his agent or servant, where the latter in publishing the defamatory matter was carrying out express orders, or acting in pursuance of express or implied authority or in discharge of his duties within the scope of his employment, or where the libelous publication has been ratified by the principal or master." Emphasis Supplied.

At 53 C.J.S. Libel & Slander, Sec. 148 under persons liable it is stated:

> "* * * As a general rule, all persons who cause or participate in the publication of liebelous or slanderous matter are responsible for such publication, each being liable in full without apportionment as to his particular share, Hence one who requests, procures, or aids and abets, another to publish defamatory matter is liable as well as the publisher. So one who furnishes the means of convenient circulation knowing or having reason to believe that it is to be used for that purpose, if it is in fact so used, is guilty of aiding the publication

> and thereby becomes liable; the fact that another initiated the objectionable matter is no excuse..* * *"

With regard to the allegation of conspiracy in the case at bar it is stated at 53 C.J.S. Libel & Slander at p. 232:

> "Conspiracy--Where a conspiracy to utter a slander is shown, each of the conspirators is liable for the slander or liable uttered or published by the others in furtherance of the conspiracy. All the conspirators are responsible for all the publications although no one of them was concerned in all."

In a note to the foregoing it is stated that when a master and servant conspire to slander in the furtherance of the conspiracy, the master is jointly liable with the servant, not on the theory of master and servant, but on the theory of joint tortfeasors. Schoedler v. Motometer Garage & Equipment Corporation, 15 N.E. 2d 953, 134 Ohio St. 78.

Petitioner submits that Powell & Oakes, Inc. is actually a sub-agent and the following with regard to that is contained in I.L.E.

Agency Sec. 1 as follows at p. 307:

> "Sub-agent
> An agent may not redelegate a power involving the exercise of judgment or discretion, but if the principal knows that certain business cannot be transacted personally by the primary agent, and knows of his employment of a sub-agent or if the employment of a sub-agent is within the primary agent's powers, the sub-agent is an agent of the principal." Tippecanoe Loan & Trust Co. v. Jester,(1913) 180 Ind. 357, 101 N.E. 915.

The foregoing applies to respondent Powell & Oakes, Inc who in reality was a sub-agent, and the acts committed in the agency when it is within the scope of its powers and ratified by the principal thereby making the principal liable. It can also be asserted that the mere fact that a conspiracy was alleged in the complaint and to be regarded as true, see infra,(summary judgment under Rule 12(b)(6) all allegations of fact to be considered as true) means also that there is an agency relationship between

the conspirators.

From the foregoing facts and citations it is readily apparent that Powell & Oakes, Inc. was subject to the jurisdiction of the court, and which the district court so found, but which the Appeals Court rejected because it did not acquaint itself with the facts and the great body of law of agency which the Court must recognize as the lex fori, i.e., the substantive law of Indiana pursuant to the Erie Tompkins Doctrine.

SUMMARY JUDGMENT REQUIRES THAT IN CONSIDERATION THEREOF ALL ALLEGATIONS OF FACT IN COMPLAINT MUST BE REGARDED AS TRUE AND PRECLUDES THE APPEALS COURT FROM DISCUSSING AND RULING ON THE VALIDITY OF THE ALLEGATIONS

The United States district court ruled summary judgment for all respondents as follows:

Respondent Anchor Hocking Glass Corp.

1. The court ruled that on motion of

respondent Anchor Hocking under Rule 56 of the Federal Rules that summary judgment be granted. A perusal of the record will show that there was no motion for summary judgment. There was only a motion to dismiss a foritori without a hearing on a non-existent motion.

2. Respondent Powell & Oakes, Inc.

The District court ruled summary judgment for subject respondent under Rule 12(b)(6) for failure to state a claim for relief based on the statute of limitations. This posed a question of law and fact. No hearing was held on the foregoing ruling and the court did not state what matters outside of the pleading were presented under this rule.

3. Respondent Herman Grant

Respondent Herman Grant filed a motion to dismiss under Rule 12(b(6) and the court ruled a motion for summary judgment as having presented matters outside of the pleadings. Respondent Grant did not present matters outside of the pleading as required in the foregoing rule. Only affidavits of respondent and his superior were submitted on the motion to dismiss which delineated respondent's duties as chief regional attorney.

In the District Court's order, first paragraph it is stated that there was a motion for dismissal by respondent Grant and

the last paragraph states that there was a motion for summary judgment by respondent Grant which is not compatible with the decision.

It is submitted that the failure of respondent Anchor Hocking Glass Corporation to file a motion for summary judgment and the court's granting of same deprived petitioner of procedural and substantive due process a fortiori without a hearing of aforesaid non-existent motion and not even allowing petitioner to respond to respondent Anchor Hocking's submission of evidence which the court granted within 15 days and summary judgment was granted even before petitioner's time to respond elapsed--8 days before the 15 days were up.

With reference to the above no where in the reported cases has petitioner found a summary judgment granted without a motion for same by one of the parties. The rule

(56) is also quite explicit on this point. There was one case reported in which a district court did grant such on its own motion but there was a motion by one of the parties. This occurred in Factora v. District Director of U.S. Immigration and Naturalization Service, (D.C.. Cal. 1968) 292 F. Supp. 518.

A pre-trial conference was held in the chambers of the District Court judge without the parties being at issue and many motions not ruled upon by the court. There was no answer by any of the respondents. The court had granted a stay of discovery to respondent Herman Grant and nothing was ever elicited from respondent Grant so as to make more definitive the issues.

A case that is analogous to the case at bar occurred in the Fifth Circuit in which it was stated that where a federal district court without affording defendants an

opportunity to make answers to and prepare themselves for trial on the merits in an action to enjoin them from alleged infringement of a trademark summarily entered a final judgment on the merits at the conclusion of a hearing for preliminary injuction, it acted without any authority of law, and such judgment could not stand. Royal Lace Paper Works, Inc. v. Pest Guard Products, Inc., (5th Cir. 1957) 240 F. 2d 814. In the foregoing case the district court did to the defendants what the case at bar did to plaintiff. The hearing could be compared to the pre-trial conference in which petitioner participated and which culminated in summary judgment for all the respondents.

Petitioner was not served a notice of motion for summary judgment by counsel for respondent Anchor Hocking Glass Corporation or Herman Grant, respondent, as stated in

the district court's order. The record will not show such motions were filed.

With regard to failure to state a claim for relief for respondents as stated in the complaint Powell & Oakes, inc. and Herman Grant, regional director of attorneys for the United States Department of Labor, it was stated in two cases in the Appeals Court own circuit that a general rule in appraising the sufficiency of a complaint for failure to state a claim for relief is that it should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. United States v. White County Bridge Commission, (7th Cir. 1960) 275 F. 2d 529. See also Central Ice Cream Co. v. Golden Rod Ice Cream Co., (7th Cir. 1958) 257 F. 2d 417. It was also stated in Bruce Const. Co. v. United States for Use of Westinghouse

Elec. Supply Co., (5th Cir. 1957) 242 F. 2d 873 regarding the same subject that a complaint is sufficient if plaintiff would be entitled to relief under some state of facts which could be proved in support of claim made therein.

Moreover, the sine qua non of granting a summary judgment under rule 12(b)(6) is that matters outside of the pleadings must be submitted by a party and the procedures followed under summary judgment under Rule 56. The District Court awarded summary judgment to Powell & Oakes, Inc., respondent, based on the Statute of Limitations which is arguable based on the matter of law and fact and concealment as alleged in petitioner's complaint.

Under Rule 56 of the Federal Rules the essential elements necessary for granting summary judgments are (1) that no genuine issue as to any material fact exists and

(2) that the movant is entitled to judgment as a matter of law; Ransom v. Haner, (D.C. Alaska 1960) 25 F.R.D. 84. A case in point of petitioner's argument was stated in De Pinto v. Provident Sec. Life Ins. Co., (9th Cir. 1967) 374 F. 2d 50 in which it was stated that a summary judgment is improper where affidavits inject genuine issues as to any material fact, regardless of ultimate finding as to such genuine issues. Cf. petitioner's affidavit with regard to deposition--pp.18 to 152 off. trans. of rec. and affidavit of Frederic Anderson pp. 302 to 306 off. trans. of rec.. Statements differ as to the two parties, petitioner and respondent Anchor Hocking Glass Corporation.

With regard to the applicability of the statute of limitations as it refers to respondent Powell & Oakes, Inc. in which the District Court granted summary judgment

for failure to state a claim for relief without the respondent bring up matters outside the pleadings, under Rule 12(b)(6) it was stated in Sheets v. Burman, (5th cir. 1963) 322 F. 2d 277 that a claim barred by applicable statutes of limitations may properly be disposed of by summary judgment procedure, if if there is disputed factually issue as to whether suit was timely brought, plaintiff must be allwoed to present evidence on this point. Cf. where petitioner raised the issue of the five year statute of limitations with regard to notaries public as delineated in Ind. Code. 34-1-2-2, Ind. Annot. Stat. 2-602 (Burns 1967 Repl.) and the statute with regard to concealment tolling the statute of limitations under Ind. Code. 34-1-2-9 (1971) Ind. Annot. Stat. 2-609 (Burns 1967 Repl.).

As part of the same matter it was stated in Doff v. Brunswick Corp. (9th Cir. 1966)

372 F. 2d 801 certiorari denied 389 U.S. 820 that the affidavits of the party opposing summary judgment are to be carefully scrutinized. A fortiori in petitioner's case where he was not apprised of a motion for summary judgment and the affidavits of petitioner and Frederic Anderson for respondent Anchor Hocking Glass Corporation contradicted each other as to the veracity in the Wirtz Case, supra. Also that the sworn statement of petitioner that he had copied the complaint in Wirtz case, supra, verbatime and that section 7(a)(6) was in the foregoing complaint rather than 7(a)(1) as submitted by respondent Anchor Hocking in its affidavit by Frederic Anderson.

The general rule is that on motion by defendant for summary judgment, plaintiff's allegations were required to be treated as true. Guinn v. Mazza, 296 F. 2d 441, 111 U.S. App. D.C. 319 (1961); the allegations

of complaint must be accepted as true on defendant's motion for summary judgment; Furton v. City of Menasha, (7th Cir. 1945) 149 F. 2d 945 certiorari denied 326 U.S. 771; Rogers v. Girard Trust Co., (5th Cir. 1947) 159 F. 2d 239; White v. Providence Hospital,(D.C. D. C. 1943) 80 F. Supp. 76. And also it was stated on motion for summary judgment in Horne v. Federal Reserve Bank of Minneapolis, (D.C. Minn. 1964) 227 Supp. 225 affirmed 344 F. 2d 725 that all facts alleged in the complaint must be assumed as true.

Furthermore there was no affidavit submitted by any of the respondents with a motion for summary judgment, which also was not filed as required by Rule 56. "Shall" within subdivision of rule 56(e) providing that affidavits filed in support of summary judgment or opposing same "shall" be made on personal knowledge, is mandatory and

requires that an affidavit state matters personally known to affiant: Sartor v. Arkansas Natural Gass Corp., 321 U.S. 620 rehearing denied 322 U.S. 767.

In a case in this own circuit (7th) it was stated that a proceeding on summary judgment is in nature of inquiry to determine whether or not genuince issue of fact exists and is not for purpose of determining such issue and does not permit trial by affidavit; Duane v. Altenburg, (7th Cir. 1962) 297 F. 2d 515. Petitioner submits that not even an affidavit was submitted with respondent Powell & Oakes, Inc. motion to dismiss and non-existent motion for summary judgment of respondent Anchor Hocking Glass Corporation, which is an a fortiori factor for petitioner in not awarding summary judgment. In addition a motion was pending before the court to submit new evidence. Eight days before the time to respond to submission of evidence

by respondent Anchor Hocking, the court granted summary judgment to aforesaid. See off. trans. of rec. p. 421.

Petitioner submits that the order of the district court and the memorandum do not jobe with regard to the order as follows:

In the first paragraph of the order the following is stated:

> "This cause came before the Court upon motion of defendant Anchor Hocking Glass Corporation for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and upon the motions of defendants Powell & Oakes, Inc. and Herman Grant to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) Federal Rules of Civil Procedure. Defendant Grant's motion which is accompanied by material outside the pleadings should be, and the same hereby is, considered to be a motion for summary judgment under Rule 56."

On page 3 of the court's memorandum opinion the following is stated:

> "Consequently the motions of defendants Anchor Hocking and Herman Grant for summary judgment and Powell & Oakes, Inc. to dismiss must be

granted."

The Court will note that as petitioner has stated, ante, respondent Anchor Hocking Glass Corporation did not file a motion for summary judgment as respondent Grant did not, which petitioner alleges is prejudicial error as affecting his rights of confrontation under the Federal Rules. The two paragraphs, supra, do not agree. In the first paragraph the court states that respondent Anchor Hocking filed a motion for summary judgment and respondents Powell & Oakes, Inc. and Herman Grant filed motions to dismiss under Ru le 12(b)(6). The second paragraph states that the motions of respondents Anchor Hocking Glass Corporation and Herman Grant for summary judgment are granted. It also states that respondent Powell & Oakes, Inc. to dismiss must be granted. This is different than the first paragraph in that the court awarded summary judgment on Rule 12(b)(6).

No matters outside the pleading were submitted by either of the respondents Powell & Oakes, Inc. or Herman Grant and petitioner was not permitted to present arguments against or to as required by the aforesaid Rule 12(b)(6), and Rule 12(b)(6) and Rule 56 of the Federal Rules. No hearing was held by the court. Herman Grant, respondent, submitted affidavits of himself and Mr. Schubert, Solicitor General, that he was acting in his official capacity as an officer of the United States Government and respondent Powell & Oakes, Inc. based its motion on the basis of the statute of limitations which was not a matter outside of the pleadings because petitioner had alleged a five year statute of limitations as to notaries public under Indiana law and also concealment of a material fact which tolled the statute of limitations in his complaint.

The foregoing authorities were submitted by petitioner for the purpose of establishing prejudicial error on the part of the District Court and also to indiate the wide unanimity of the various circuits and of the United States Supreme Court with regard to summary judgment and the consequences appertaining thereto.

Petitioner als submits as the the statement under this section indicates that when the Appeals Court for the Seventh Circuit ruled on the merits of the allegations in the complaint that prejudicial error resulted to petitioner's case. Since all of the allegations in the complaint are to be considered as true in summary judgment and failure to state a claim upon which relief can be granted, it is submitted that the United States Court of Appeals for the Seventh Circuit was precluded from ruling on the validity of petitioner's allegations as to law and fact and

the merits of the case. It may also be inferred from the foregoing that the allegations also precluded the United States Court of Appeals from ruling as there being no jurisdiction between the parties under Diversity of Citizenship and the Federal Question.

Prejudicial error is defined in Black's Law Dictionary, (4th Ed. 1951) as being an error substantially affecting appellant's legal rights and obligations. Petitioner submits that both the District Court and the Appeals Court prejudicially erred in finding for respondents.

An observation petitioner submits to the Court is that the offices of the federal court and the Federal Rules of Civil Procedure were used to accomplish respondents' nefarious objective, and which has resulted in ruination of petitioner's practice of law before it ever got off the ground.

It is also submitted by petitioner that the Federal Rules of Civil Procedure, rule 30 contain the admonition that a deponent is not to be embarassed by the interrogator in the taking of the deposition, which is the understatement of all time as it pertains to this case.

Adding insult to injury was the statement in the deposition that Mr. John Sieger, attorney for the Solicitor's office that he was there for plaintiff. In the entire 3 hour deposition, he did not make one objection to any questions, particularly when petitioner was asked if he had ever taken bribes in his work. See page 124--Trans. of r ec.--affidavit of petitioner.

CONCLUSION

WHEREFORE, petitioner prays that the Court grant his petition for certiorari for the foregoing reasons and citations.

Respectfully submitted,

Morris I. Cohen,
Attorney pro se

A P P E N D E D
O P I N I O N S

1. Opinion of petition for rehearing en banc.
2. Opinion of United States Court of Appeals for the Seventh Circuit
3. Opinion of United States District Court for the Southern District of Indiana, Indianapolis Division.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 30, 1975

Before

Hon. ALBERT B. MARIS, Sen. Cir. Judge*

Hon. WALTER J. CUMMINGS, Cir. Judge

Hon. WILBUR F. PELL, JR., Cir. Judge

MORRIS I. COHEN, Plaintiff-appellant No. 74-1064 vs. ANCHOR HOCKING GLASS CORPORATION, POWELL & OAKES, INC., and HERMAN GRANT, Defendants-appellees.	)	Appeal from the United States Dist. Court for the Southern Dist. of Indiana Indianapolis Division No. IP-72-C-185

In his petition for rehearing, Cohen challenges the statement in this court's order of June 3, 1975, that it was undisputed that there was no diversity between plaintiff and Herman Grant, Regional Director of Attorneys for the United States Department of Labor, was at all material times a resident of the state of Illinois. The petitioner therefore states that there was

*Senior Circuit Judge Albert B. Maris of the Third Circuit is sitting by designation.

diversity jurisdiction as to Grant. While technically Cohen may be correct in his statement, we note that as the matter stood before the district court, jurisdiction on the basis of diversity was alleged only as to Anchor Hocking. As to Grant, the plaintiff only claimed jurisdiction "based on a federal question, and federal statutes."

If Grant were a non-resident of the Southern District of Indiana, it is not quite clear to the court how personal jurisdiction was acquired over him. Indeed, in Grant's motion to dismiss filed by the United States Attorney one of the prongs of attack was the lack of personal jurisdiction. At no time did plaintiff in response rely on diversity. The United States Attorney apparently did not particularly pursue the personal jurisdiction defense, being satisfied, as we would be if the question were to be reached, that for other reasons a cause of action was not stated as to Grant.

In any event, there must be, as we pointed out in the order of June 3, 1975, complete diversity between the parties. That situation remains unchanged as to Powell & Oakes.

We find no merit raised by the petition for rehearing and no judge in active service having requested a vote, the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 3, 1975

Before

Hon. ALBERT B. MARIS, Sen. Cir. Judge*

Hon. WALTER J. CUMMINGS, Cir. Judge

Hon. WILBUR F. PELL, JR., Cir. Judge

MORRIS I. COHEN, Plaintiff-appellant, No. 74-1064 vs. ANCHOR HOCKING GLASS CORPORATION, POWELL & OAKES, INC., and HERMAN GRANT, Defendants-appellees.	) Appeal from) the United) States Dist.) Court for the) Southern Dist.) of Indiana,) Indianapolis) Division No. IP-72-C-185

Plaintiff's complaint sought damages based upon an alleged defamation of himself by conduct of Anchor Hocking Glass Corporation, Powell & Oakes, Inc., and Herman Grant. The district court dismissed as to defendant Grant pursuant to Rule 12(b)(6), Fed. R. Civ. Pr., and entered judgment for the remaining defendants on a summary judgment basis.

*Senior Circuit Judge Albert B. Maris of the Third Circuit is sitting by designation.

The results reached by different procedural routes were nevertheless predicated upon the common reason that the applicable statute of limitations barred the bringing of the action. Ind. Code § 34-1-2-2 (1971), Ind. Annot. Stat. §2-602 (Burns Repl. 1967).

Based upon our examination of the briefs submitted by the parties and the record of this case and after hearing oral argument, we have difficulty in denying arguable merit to the dispositive foundation on which the district court rested its decision, however, we need not reach a final determination in that respect for we are convinced that plaintiff has failed to cross the jurisdictional threshold for the use of the federal forum.

It is undisputed that there is diversity between plaintiff and defendant Anchor Hocking. It is equally undisputed that there is no diversity between plaintiff and defendants Powell & Oakes, and Herman Grant. How-

ever, plaintiff argues that he has federal question jurisdiction over these two defendants and there is also diversity jurisdiction over them because they are agents of Anchor Hocking.[1] It is axiomatic that complete diversity between all plaintiffs and all defendants is requirred under 28 U.S.C. 1332, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); but diversity and other jurisdictional requisites may be combined so that diversity may support jurisdiction as to claims against certain parties, and other jurisdictional principles may support claims against other parties. Romero v. International Terminal Operating Co., 358 U.S. 354, 381 (1959); 1 Moore, Federal Practice 0.60 (8.-4) at 645 n.39 (2d ed. 1974).

The test to determine whether a sufficient federal claim has been pleaded to establish jurisdiction has been stated in various ways. Jurisdiction does not turn upon the validity of the claim set up, but upon the fact that

1. We find no merit in the agency contention. Lack of diversity, in our opinion, cannot be obviated by the fact of agency for a diverse party.

there is a real and substantial controversy respecting a federal question. Benedict v. City of New York, 247 F. 758, 760 (2d Cir. 1917), aff'd on other grounds, 250 U.S. 321 (1919). The suit must really and substantially involve a dispute or controversy respecting the validity, construction, or effect of a federal law. Hines v. Cenla Community Action Committee Inc., 474 F. 2d 1052 (5th Cir. 1973). See Standage Ventures, Inc. v. Arizona, 499 F. 2d 248 (9th Cir. 1974); Shulthis v. McDougal, 225 U.S. 561, 569 (1912). That a claim is bad is not sufficent to deprive a court of federal jurisdiction unless it is frivolous or only a matter of form. Bell v. Hood, 327 U.S. 678, 682 (1946); Wright, Law of Federal Courts § 18 at 62 (1970).

Plaintiff argues several bases for federal jurisdiction.

1. Tort Claims Act, 60 Stat. 842 (1946).

The federal Tort Claims Act applies to actions against the United States, not its

employees. The United States was not named as a party in this case and thus the statute has no relevancy. Even if the United States were named as a party, plaintiff has not pleaded that the presentation prerequisites of an action under the act have been met. Finally, § 421 at 846 excepts claims arising out of libel, slander, and misrepresentations.

2. 28 U.S.C. §1651

This section provides that federal courts may issue all writs in aid of their jurisdiction. The plaintiff sought a writ of mandamus from the district court. The writ of mandamus has been abolished in the district court, Fed. R. Civ. P. 81(b). Since similar remedies are available, we do not consider this a deciding factor regarding jurisdiction. Nevertheless, a mandamus type remedy is an ancillary remedy to be utilized only in the exercise of jurisdiction already acquired and is not an independent basis of jurisdiction. Craig v. California, 376 F. 2d 583 (7th Cir. 1967). Further relief

in the nature of mandamus as sought by the plaintiff in this case against these individual defendants would have been inappropriate. Finley v. Chandler, 377 F. 2d 548 (7th Cir. 1967) cert. den. 389 U.S. 869. Seeking inaappropriate relief in no basis for federal question jurisdiction.

3. Fifth Amendment--Due Process Clause

Plaintiff makes two due process claims. The first was made in the district court which is relevant here. The second was made on appeal regarding procedural irregularities in the district court and is not relevant in considering the district court's jurisidiction. Plaintiff cites United States v. Robel, 389 U.S. 258 (1967) as holding that the right to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the fifth amendment. Robel involved greatly different facts than this case, and we are not persuaded that it should be extended to cover facts such as those in

the present case. Robel was convected of violating an overbroad statute which forbad (sic) his employment in a defense related company; he was thereby denied his first amendment right of association. In this case the alleged due process violation consisted of the failure by Dorothy Huffman, a reporter and notary public, to file a deposition with the court in another case. We fail to discern a real and substantial controversy respecting a federal question insofar as the non-diversity defendants are concerned.

4. Remaining Contentions.

These revolve in a non-convincing fashion around the status of Powell & Oakes as court reporters and Grant as a federal employee. 28 U.S.C. §§ 753 deals with the appointment qualification, and pay of court reporters in district courts. Rule 30, Fed. R. Civ. P., provides for the signing and filing of

depositions with the district court.. Assuming that Huffman was an employee of Powell & Oakes and that she did not file a deposition in a different case in which plaintiff was a deponent, not a party, we find no basis in these facts for federal question jurisdiction.

Finally, plaintiff argues that his complaint alleges a conspiracy which implicates all parties as to the federal question. This assumes a federal question but we have found none.

While we respect the apparent sincerity with which the plaintiff has pressed his case both at the trial court and appellate court, we, in sum, conclude that the claim of federal issues as providing jurisdiction must be termed frivolous.

Inasmuch as the case should have been dismissed as to all defendants because of lack of jurisdiction, and inasmuch as a correct result was reach below, we affirm the judgment

of the district court for the reasons indicated herein without deciding whether the basis upon which the district court acted would have been a correct one if jurisdiction had existed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

MORRIS I. COHEN, VS. ANCHOR HOCKING GLASS CORPORATION, POWELL & OAKES, INC., and HERMAN GRANT	)	No. IP-72-C-185

ORDER GRANTING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND JUDGMENT

This cause came before the court upon the motion of defendant Anchor Hocking Glass Corporation for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and upon the motions of defendants Powell & Oakes, Inc. and Herman Grant to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Defendant Grant's motion which is accompanied by material outside of the pleadings should be, and the same hereby is, considered to be a motion for summary

judgment under Rule 56.

The Court, having heard the argument of counsel, having considered the briefs and affidavits filed in support and opposition to the motions, and now being duly advised in the premises, it is hereby

ORDERED that the motion of defendant Powell & Oakes, Inc., to dismiss for failure to state a claim upon which relief can be granted be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motions for summary judgment filed herein by defendants Anchor Hocking Glass Corporation and Herman Grant be, and the same hereby are, GRANTED, with judgment to be entered for the defendants and against the plaintiff.

DATED this 15th day of Nov. 1973.

(stamp) James E. Noland

MEMORANDUM OPINION

Plaintiff's complaint alleges a claim for relief for defamation of character aginst the defendants in connection with the taking of a deposition in a prior action in this district

entitled Wirtz v. Anchor Hocking Glass Corp., Cause No. IP 67-C-140.

Ind. Code §34-1-2-2 (1971) Ind. Annot. Stat. §2-601 (sic)(Burns Repl. 1967) provides that all actions for injuries to person or character must be brought within two years of the time the action accrues. Plaintiff alleges that the defamation occurrred on February 5, 1969, and this action was filed on April 21, 1972.

It is clear that the plaintiff's action accrued at the time of the alleged injury to his character. Merritt v. Economy Dept. Store, 125 Ind. App. 560, 128 N.E. 2d 279 (1955). Therefore, the plaintiff's claim, filed more than three years after the injury, is barred by the statute of limitations.

Plaintiff's further allegations regarding the improper transcription of the deposition, the alleged failure to file the same with the court, and the alleged violations of statutes by the reporter are equally unpersuasive. These allegations cannot separately provide a

a basis for relief by the plaintiff as he was not a party to the prior suit and has not shown any injury in fact, except for the allegation of defamation, from the other alleged failures. In short, except as these allegations may bear on the defamation claim which is now barred by the statute of limitations, the plaintiff has no standing to raise these matters before the Court.

Consequently the motions of the defendants Anchor Hocking and Herman Grant for summary judgment, and Powell & Oakes, Inc. to dismiss, must be granted.

Findings of fact and conclusions of law, where necessary to the summary judgment motions herein, have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by Rule 52(a), Fderal Rules of Civil Procedure. Plaintiff's complaint is DISMISSED.